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Crb 1580/02

Crb 13789-99/02

Crb 16049/02

Crb 1647-8/02

Crb 15180/02

Crb 14831/02

Crb 16231/02

1. THE STATE V TAWANDA MUKURA
2. THE STATE V SIMON PHIRI AND OTHERS
3. THE STATE V BRIAN GANDAWA
4. THE STATE V TAURAI MUTSURA AND ANOTHER
5. THE STATE V HENRY MUSARURWA
6. THE STATE V KENNEDY NYAWATA
7. **THE STATE V SIMBARASHE MARI**

HIGH COURT OF ZIMBABWE
 HUNGWE J,
 HARARE, 28 May, 2003

Criminal Review

HUNGWE J: The above records were dealt with by the same **P**rovincial **m**Magistrate. They all raise the same point.

The point raised is the propriety of a community service order enjoined with a custodial sentence suspended on condition of restitution. In other words, is it proper, where a court imposes a community service order, to suspend a portion of the sentence on condition of restitution?

In **the case of S Tawanda Mukura** the accused, a vendor pleaded guilty to theft by conversion of property valued at \$30 000 after he was given stock valued at \$38 910 to vend. He was sentenced as follows:-

20 months' imprisonment with labour which is wholly suspended on condition hereunder:-

(a) **12 months' imprisonment with labour are suspended on condition the**

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accused completes 420 hours' community service at Ardbennie Primary School with effect from 15th April, 2002. It shall be done on Monday to Friday excluding public holidays between 8 a.m. to 1 p.m. and 2 p.m. and 4 p.m. and until it is complete it shall be done to the satisfaction of the supervisor.

- (b) 6 months' imprisonment with labour are suspended on condition the accused compensates the complainant in the sum of \$30 002 through the clerk of court, Mbare, on or before 30th May, 2002".

When the matter was placed before me on review I enquired of the trial magistrate what would happen if the probationer failed to make full restitution before or on the appointed date. As I feared, the terse reply was that he would go to prison.

Herein lies the irony.

Is restitution a real option to grant a probationer when there is no prospect of him living up to a condition?

In the remaining cases, similar sentences were imposed. There are two conditions of suspension, the first relates to performance of community service by the offender and the second relates to making full restitution through the Clerk of Court on or before a specified date. There is no Payment Record Sheet (commonly referred to as the Time to Pay Sheet). Only in the case of *S v Kennedy-Nyawata* is this sheet filed with the probationer's particulars.

In *S v Simon-Phiri and Others* three accused stole an array of household property over a period of time during their employ with the complainant. The property stolen is valued at \$180 000 but only that worth \$60 000 was recovered. They were each sentenced to 30 months' imprisonment, with 18 months suspended

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on conditions that they each perform 526 hours of community service and the balance of 12 months on condition they each make restitution in the sum of \$40 000 to the complainant by 31 January, 2003.

In *S v Brian Gandawa* the accused stole a Nokia 5110 mobile phone valued at \$85 000. It vanished. He was sentenced to 20 months' imprisonment. ~~Twelve~~ ~~12-~~ and ~~eight~~ ~~8-~~ months were suspended on condition of due performance of 420 hours community service and making full restitution of \$55 000 to the complainant through the Clerk of Court by 31 March, 2003.

In *S v Taurai Mutsara and Another* two young men stole 6 tonnes of wheat valued at \$60 000 from the National Railways of Zimbabwe. Nothing was recovered. They each were sentenced to 18 months' imprisonment of which 12 months were suspended on condition of due performance of 420 hours community service and the remaining 8 months on condition they each paid \$30 000 to the NRZ through the Clerk of Court by 31 March, 2003.

In *S v Henry Musarurwa* the accused stole electrical spares valued at \$45 500. That valued at \$18 600 was recovered. He was sentenced to 18 months' imprisonment. ~~Ten~~ ~~10-~~ months and ~~eight~~ ~~8-~~ months respectively were suspended on conditions similar to the previous matter.

In *S v Kennedy Nyawata* the accused, a shopkeeper, took the days takings amounting to \$158 828 for banking. He did not bank it. He was only arrested 6 months later having spent all the money. He was sentenced to 30 months' imprisonment. ~~Eighteen~~ ~~18-~~ months and 12 months were suspended on conditions similar to the previous cases. He was given until 30 April, 2003 to make full restitution.

As I have pointed out above, in these seven cases the issue is: ——— ~~Is~~ it proper to conjoin a community service order with a sentence suspending a condition of restitution?

It is trite that community service is aimed at avoiding sending to prison the non-serious offenders. The object of community service is summarised by J Reid-Rowland in *Criminal Procedure in Zimbabwe* at p 25-48 as follows:

"The object of community service is to enable non serious offenders – that is, those who would otherwise have been sentenced to a term of imprisonment of twelve months or less – to benefit the community by doing useful work. The fiscus benefits by not having to pay for the upkeep of the person in prison. The offender benefits by being able, if he is employed, to continue in his employment and to avoid the destructive effect of a short term of imprisonment".

This objective was recognised by the court in *S v Antonio* 1988 (2) ZLR 64

(H) when ~~C~~HINHENGO J stated:

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"Community service is a statutorily sanctioned non-custodial sentencing option which it is competent to impose as a direct form of punishment or as an alternative to the payment of a fine or imprisonment".

(at p 69 G).

Dealing with a similar situation WADDINGTON J in *S v Manzini* 1984 (1)

ZLR 33 **stated** at 35H-36H:

"In the view I take of the matter, the propriety of the magistrate suspending four months' imprisonment with labour, on condition that the accused repays a sum which he clearly will never be able to repay, is open to the most serious doubt. It has been held on a number of occasions that there must be a real likelihood that this type of condition is reasonably capable of fulfilment for otherwise the object of the condition, namely, to keep the accused out of prison or to reduce the length of the prison term imposed and to compensate the complainant, could be defeated. In *R v Lamb* 1969 (2) RLR 193 at 196A-C; 1969 (3) SA 149 (R) at 151 QUENET ACJ said:

'When a court considers that part of a sentence of imprisonment should be suspended, subject to stated conditions, it does so in the hope and expectation that the conditions will be fulfilled. If it is reasonably clear that the conditions are incapable of fulfilment, there is no point in granting a suspended sentence. In a word, one must not ask the impossible of a person in whose favour a suspended sentence is granted, just as one must not, when imposing a fine, impose a fine of such severity that it cannot be paid. In such circumstances, the condition is wholly unrealistic, and bears no relation to the desire - the sincere desire, possibly - of the offender to comply with the condition. The condition must be reasonably capable of fulfilment. If it is not, then it is not the kind of condition which should be made a condition of suspension'.

These sentiments were echoed some years later by GUBBAY J (as he then was) in *S v Zumbika* 1978 (3) SA 155 at 156D-F. The learned judge there observed:

'The objects of a condition of this type were considered by CILLIE JP in *S v Tshondeni*; *S v Vilakazi* 1971 (4) SA 79 (T) at 82H-83F and were stated to be: (a) to prevent the offender serving a sentence of imprisonment (either in its entirety or in part); (b) to cause the offender to appreciate fully the consequences of his irresponsible criminal conduct; and (c) to compensate the injured party for the loss suffered.

The condition must be reasonably capable of fulfilment. If it is reasonably clear that it will not be met, there is no point in granting a suspended sentence, for the first and third objects of the condition will be frustrated and also the second to a great extent. The offender will then serve imprisonment on account of his poverty and not because of any *mala fides* or negligence on his part. See *R v Lamb* 1969 (3) SA 149 (RA) at 151A-C; *S v Magkise* 1973 (2) SA 493 (O) at 494D-F'.

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In the present case, having regard to the exiguous assets of the accused and his miserable employment prospects, it is difficult in the extreme to see what justification there was for the imposition of a condition which from the outset must have constituted an impossible hurdle for the accused. Property advised, in my view the trial magistrate should not have imposed the condition".

I am in total agreement in so far as the condition of restitution has been imposed in the seven cases in question in this review.

A community service order in these cases has been imposed as an alternative to imprisonment. Imposition of such an order is a clear indication by the trial court of its assessment of the accused as one eligible to benefit from it. It is a clear manifestation that a court has decided to spare an accused the rigors of prison.

It is usual, where a prison term has been set, and a decision to suspend a portion of that sentence on condition that community service is performed, taken to suspend a further portion on condition of good behaviour. This reflects the standard practice of suspending a portion of any sentence imposed on a first offender. It is said that it deters the offender from repeating his offensive conduct well after the sentence has been served. It also reduces the actual period that an accused serves. It therefore has a dual purpose. This is the reason why it has been held that unless there are compelling reasons a portion of any custodial sentence imposed on a first offender ought to be suspended on conditions of good behaviour.

See :-

— **S v Mpofu (2) 1985 (1) ZLR 285 (H);**

— **S v Gorogodo 1988 (2) ZLR 378 (S);**

— **S v Makunga 1990 (1) ZLR 124 (H);**

— **S v Chirara & Others 1990 (2) ZLR 156 (H).**

It has been the practice of the courts therefore to attach the conditions to all cases involving first offenders.

Where however a court intends to impose a further condition of suspension of a custodial term, care must be taken in selecting the appropriate conditions of suspension. The sentencing court does have a wide discretion, as set out in the Criminal Procedure and Evidence Act [Chapter 9:07], to choose what sentence to impose. It can elect to suspending a custodial term on any condition that is appropriate to that case. However the court must exercise that discretion judiciously. It is not a judicious exercise of that discretion to settle on a sentencing option which destroys, on the turn, the benefits conferred the probationer by a community service order.

Where a court considers suspending part of the sentence, subject to the stated conditions, it must not ask the impossible of the person in whose favour the

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suspension is granted, just as one must not, when imposing a fine, impose a fine of such severity that it cannot be paid. In such circumstances the condition is unrealistic and bears no relation to any desire by the offender to comply with it. The condition must be reasonably capable of fulfilment. If it is not, then it is not the kind which should be made on condition of suspension.

— See *R v Lamb* 1967 (2) RLR 193.

There is no point in imposing an order for the performance of community service and at the same time impose another condition suspending the balance of the custodial sentence whose fulfilment is unlikely.

In all these cases there has been no enquiry with the accused to establish whether any one of them is able to make restitution within the stipulated time.

Although a desire to comply may have been expressed by the accused, the sentencing court has to satisfy itself that an accused can make restitution before it imposes restitution as a condition of suspension together with an order of community service. To fail to do so is a **misdirection.**

The portion of the sentence relating to community service is confirmed. The subsequent portions are amended to read as follows for each case:—

(1) *S v T Mukura*

"(a).....

(b) 6 months' imprisonment is suspended for five years on condition the accused does not during that period commit any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine".

(2) *S v S Phiri and Another*

"(a).....

(b)12 months' imprisonment is suspended for five years on condition the accused is not during that period, convicted of any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine".

(3) *S v B Gandewa*

"(a).....

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(b) 8 months' imprisonment is suspended for five years on condition the accused is not, during that period, convicted of any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine".

(4) S v T Mutsara & Another

"(a).....

(b) 6 months' imprisonment is suspended for 5 years on condition the accused is not, during that period, convicted of any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine".

(5) S v H Musarurwa

"(a)

(b) 8 months' imprisonment is suspended for 5 years on condition the accused is not, during that period, convicted of any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine".

(6) S v K Nyawata

"(a)

(b) 12 months' imprisonment is suspended for five years on condition the accused is not, during that period, convicted of any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine".

(7) S Simbarashe Mari

"(a)

(c) 8 months' imprisonment is suspended for five years on condition the accused is not during that period convicted of any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine".

As this represents a substantial alteration of the sentence it is directed that the accused is summoned to court in order that this alteration be explained to him.

CHINHENGO J agrees.

